No. 99-

IN THE

Supreme Court of the United States

THE CAMBRIDGE HOSPITAL,

Petitioner,

v.

DONNA E. SHALALA, Secretary,
Department of Health and Human Services,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Secretary of Health and Human Services' constriction of the statutory language in 42 U.S.C. § 1395ww(d)(5)(i)(II) is contrary to the statute's plain language, its purpose and this Court's precedent.

Whether the Court of Appeals erred in upholding the Secretary's construction.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, The Cambridge Hospital, has no parent corporation and no publicly held company owns ten (10) percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
TABLE OF APPENDICES	vii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
A. Medicare Reimbursement and the Disproportionate Share Adjustment.	2
B. The Petitioner.	4
C. The Decisions Below.	4
REASONS FOR GRANTING THE WRIT	7
I. The Interpretation Of The Pickle DSH Statute Is Critically Important To The Nation's Uninsured Indigent And To The Hospitals Upon Which They Depend.	7

Contents

Page

II. The Secretary's Interpretation Of The Pickle DSH Statute Is Contrary To Its Plain Language, Its Purpose And This Court's Precedent. 8

A. Standard of Review. 8

B. The Secretary's interpretation of the Pickle DSH statute conflicts with its plain language and fails to accord the statute's words their common, ordinary meaning. 9

C. The Secretary's interpretation is inconsistent with this Court's mandate that, where possible, every word in a statute must be given effect. 14

D. The Secretary's interpretation of the Pickle DSH statute is contrary to Congress's overt and stated purpose in creating the Pickle DSH adjustment. . . 17

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S. Ct. 2778 (1984) 8

Crandon v. United States, 494 U.S. 152, 110 S. Ct. 997 (1990) 14

Dole v. United Steel Workers of America, 494 U.S. 26, 110 S. Ct. 929 (1990) 9

K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 108 S. Ct. 1811 (1988) 9

Landgraff v. USI Film Products, 511 U.S. 244, 114 S. Ct. 1483 (1994) 16

North Broward Hosp. Dist. v. Shalala, 997 F. Supp. 41 (D.D.C. 1998) ..... *passim*

North Broward Hosp. Dist. v. Shalala, 172 F.3d 90 (D.C. Cir. 1999) 6, 12

Perrin v. United States, 444 U.S. 37, 100 S. Ct. 311 (1979) 10

Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P., 507 U.S. 380, 113 S. Ct. 1489 (1993) 10

Cited Authorities

Page

United States v. Bowen, 100 U.S. 508 (1879) 11

Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202, 117 S. Ct. 660 (1997) 14

Statutes:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 426 16

42 U.S.C. § 1395c 16

42 U.S.C. § 1395oo(f)(1) 1, 5

42 U.S.C. § 1395ww(d) 2

42 U.S.C. § 1395ww(d)(5)(F)(i)(I) 3

42 U.S.C. § 1395ww(d)(5)(F)(i)(II) ..... *passim*

Other Authorities:

BLACK'S LAW DICTIONARY 1432 (6th ed. 1990) 10

H.R. Conf. Rep. No. 100-495 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1291 ..... 13, 14

H.R. Rep. No. 99-241 (1985), *reprinted in* 1986 U.S.C.C.A.N. 579 ..... 3, 4, 18

Pub. L. No. 100-203, 101 Stat. 1330 (1987) 13

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Dated And Filed August 2, 1999 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of Columbia Dated June 8, 1998 ..... 3a

Appendix C — Opinion Of The United States Court Of Appeals For The District Of Columbia Circuit In *North Broward Hospital District, et al. v. Donna E. Shalala, Etc.*, No. 98-5164 Dated And Decided April 27, 1999 ..... 19a

Appendix D — Relevant Statute 44a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A) is unreported. The opinion of the United States District Court for the District of Columbia (Appendix B) is unreported. The opinion of a related case *North Broward Hospital District, et al. v. Donna Shalala, Secretary, U.S. Department of Health and Human Services*, (Appendix C), upon which the Court of Appeals based its ruling in this case is reported at 172 F.3d 90.

JURISDICTION

The judgment of the court below was entered on August 2, 1999. (Appendix A at 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction in the district court was properly invoked under 42 U.S.C. § 1395oo(f)(1).

STATUTORY PROVISION INVOLVED

The statutory provision at issue is 42 U.S.C. § 1395ww(d)(5)(F)(i)(II). It is reproduced in pertinent part in Appendix D at 42a.

STATEMENT OF THE CASE

The issue presented by this case is the statutory construction of one of Congress's Medicare reimbursement formulas. Proper construction of this Pickle Disproportionate Share Hospital ("Pickle DSH") statute is not, however, the only issue. The overriding question presented is whether the Secretary of Health and Human Services (the "Secretary")

may thwart Congress's plainly articulated will by imposing a result-oriented misinterpretation of a Medicare reimbursement statute, and thus effectively block access to healthcare for many low-income and uninsured citizens.

Certiorari should be granted for two compelling reasons. First, the statute at issue provides critical funding to safety-net hospitals, hospitals that provide large amounts of care to low-income and indigent populations. In an environment in which many such healthcare entities are struggling for financial survival, the Secretary's impermissible construction of the Pickle DSH statute places these safety-net hospitals and the low-income and uninsured indigent populations that they serve in jeopardy.

Second, the Secretary's interpretation of the Pickle DSH statute is contrary to this Court's precedent and usurps Congress's legislative function by flouting the statute's language and purpose.

A. Medicare Reimbursement and the Disproportionate Share Adjustment.

Congress established the federal Medicare program in 1965 to provide medical insurance coverage to individuals over the age of 65 and to other qualifying persons. In 1983, in an effort to contain costs, Congress abandoned its former practice of reimbursing hospitals for inpatient services to Medicare beneficiaries on a reasonable cost basis and adopted a new reimbursement system, known as the Prospective Payment System ("PPS"). 42 U.S.C. § 1395ww(d). Under PPS, hospitals are paid a prospectively determined amount based on the diagnosis of the patient when discharged. *Id.*

Congress recognized, however, that, under PPS, certain hospitals serving a large number of indigent and low-income patients would incur higher relative costs for services. To help these safety-net hospitals maintain financial viability, Congress created the disproportionate share hospital or "DSH" adjustment under which hospitals serving a disproportionately large number of low-income patients would receive additional payments from the Medicare program, over and above their PPS reimbursement.

Congress ultimately created two alternative DSH tests designed to compensate for the financial drain of two different low-income populations. H.R. Rep. No. 99-241, pt. 1 at 18 (1985), *reprinted in* 1986 U.S.C.C.A.N. 579, 596. *See also* 42 U.S.C. § 1395ww(d)(5)(F)(i)(I) and 42 U.S.C. § 1395ww(d)(5)(F)(i)(II).

The more commonly used DSH test, called the proxy test, was designed to track a hospital's low-income Medicare (Supplemental Security Income or "SSI") and Medicaid *utilization*. H.R. Rep. No. 99-241, pt. 1 at 16 (1985), *reprinted in* 1986 U.S.C.C.A.N. 579, 595 (stating Committee's intent with proxy test was to measure presence of low income patients); *see also* 42 U.S.C. § 1395ww(d)(5)(F)(i)(I). By concentrating on SSI and Medicaid utilization, however, the proxy method does not identify or assist another group of hospitals that Congress determined needed additional assistance under the PPS system due to their service to the indigent population: hospitals that treat large numbers of patients not eligible for SSI or Medicaid who are nonetheless indigent and unable to pay for health care.

In an effort to assist this latter group of safety-net hospitals, Congress created the Pickle DSH adjustment as an alternative to the proxy DSH method. *See* H.R. Rep. No. 99-241, pt. 1 at 18 (1985), *reprinted in* 1986 U.S.C.C.A.N. 579, 596. Because the Pickle DSH method was crafted to assist safety-net hospitals provide health care for indigents not eligible for federal funding (*i.e.*, non-SSI, non-Medicaid indigent), Congress logically designed a mathematical formula that excluded consideration of federal revenues. *See* 42 U.S.C. § 1395ww(d)(5)(F)(i)(II).

B. The Petitioner.

The Cambridge Hospital ("Cambridge" or "Petitioner") is a public, non-profit medical institution that participates in the Medicare and Medicaid programs. Cambridge is a safety-net hospital that provides health care to people in need, regardless of their ability to pay. As of June 30, 1998, approximately eighty-three (83) percent of the hospital's overall charges were attributable to patients who were either uninsured or covered by Medicare, Medicaid, or State and local indigent care programs.

C. The Decisions Below.

Administrative Review. Petitioner claimed entitlement to the Pickle DSH Adjustment for its fiscal year 1990. The Health Care Financing Administration ("HCFA") denied Cambridge's request. (Appendix B at 7a).

Cambridge timely appealed the denial of its request for a Pickle DSH adjustment to the Provider Reimbursement Review Board ("PRRB"). (Appendix B at 7a). Cambridge

then requested expedited judicial review ("EJR") from the PRRB, a request the PRRB granted.[1] (Appendix B at 7a).

District Court. Cambridge filed its complaint in the United States District Court for the District of Columbia on July 17, 1995. (Appendix B at 7a). On cross-motions for summary judgment, the district court entered judgment in favor of Cambridge and against the Secretary. The district court concluded that "the Secretary's interpretation of [the Pickle DSH statute] contradicts the manifest statutory language and congressional intent." *The Cambridge Hosp. v. Shalala*, Civ. Action No. 95-1310 (D.D.C. June 8, 1998) (Appendix B at 3a-4a). The district court elaborated that the Secretary's interpretation "depend[ed] on agile feats of linguistic and mental acrobatics that find no support in traditional canons of statutory construction," (Appendix B at 14a), and that to accept the Secretary's interpretation would "deviate from the Supreme Court's instruction that in construing a statute we are obliged to give effect, if possible, to every word that Congress used." (Appendix B at 10a) (internal quotation and citation omitted).[2]

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1. Under 42 U.S.C. § 1395oo(f)(1), the PRRB may permit a provider who has appealed an intermediary's decision to bypass the PRRB's hearing procedure and obtain judicial review, when the PRRB determines that it is without authority to decide the issue, because it is a question of law.

2. Unlike Plaintiffs in *North Broward Hosp. Dist. v. Shalala*, 997 F. Supp. 41 (D.D.C. 1998), who challenged only the Secretary's calculation of the Pickle DSH denominator in their lawsuit, Cambridge challenged the calculation of both the numerator and the denominator. The district court, however, did not reach the numerator issue. The court ruled in Cambridge's favor on the denominator issue, and that decision was sufficient to enable Cambridge to qualify for the Pickle DSH adjustment without regard to the numerator.

Court of Appeals. The Secretary appealed to the Court of Appeals for the District of Columbia Circuit and moved to hold briefing in abeyance pending the resolution of the appeal already pending in *North Broward Hosp. Dist. v. Shalala*, 997 F. Supp. 41 (D.D.C. 1998), a case raising the identical legal issue.[3] The Court of Appeals granted this motion over Cambridge's objection and denied Cambridge's motion to consolidate its appeal with the appeal in *North Broward*, effectively denying Cambridge participation in the outcome of its appeal.

On April 27, 1999, the Court of Appeals reversed the district court's decision in favor of the plaintiff hospitals in the *North Broward* case. *North Broward Hosp. Dist. v. Shalala*, 172 F.3d 90 (D.C. Cir. 1999) (Appendix C at 20a). The court determined that Congress had not spoken directly to the issue of whether Medicare and Medicaid revenues were to be excluded from both the numerator and the denominator of the Pickle DSH calculation. *Id.* at 99 (Appendix C at 38a). The court further concluded that the Secretary's interpretation was a permissible construction of the statute. *Id.* (Appendix C at 39a).

In light of its decision in *North Broward*, the Court of Appeals on August 2, 1999, granted the Secretary's motion to vacate the district court's order in the *Cambridge* appeal and remand the case to the district court for further proceedings consistent with the *North Broward* decision. *The Cambridge Hosp. v. Shalala*, No. 98-5426 (D.C. Cir. August 2, 1999) (Appendix A at 1a-2a).

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3. As in the *Cambridge* case, another judge of the United States District Court for the District of Columbia entered judgment for the North Broward plaintiffs, and the Secretary appealed.

REASONS FOR GRANTING THE WRIT

I.

THE INTERPRETATION OF THE PICKLE DSH STATUTE IS CRITICALLY IMPORTANT TO THE NATION'S UNINSURED INDIGENT AND TO THE HOSPITALS UPON WHICH THEY DEPEND.

The scope of relief afforded by the Pickle DSH adjustment is of paramount importance to the uninsured indigent citizens of the United States and to the safety-net hospitals which bear a disproportionate burden for treating these citizens. Despite Congress's clear recognition that the providers of care to these uninsured indigent need additional Medicare reimbursement under the PPS system, the Secretary has adopted an impermissible construction of the Pickle DSH adjustment that vitiates its purpose.

The Supreme Court has not ruled on the meaning of the Pickle DSH statute before the petitions by North Broward and Cambridge, but there is compelling reason to do so now. This case has increased significance, because it was decided by the Court of Appeals for the District of Columbia Circuit, the court to which all Medicare providers by law have venue to appeal adverse determinations. The special status enjoyed by the District of Columbia Circuit Court of Appeals in this regard gives heightened importance to its rulings in administrative cases such as this one.

Allowing the Court of Appeals' decision to stand would be detrimental to the groups that Congress created the Pickle DSH adjustment to protect. As outlined below, the Court of Appeals' construction of the Pickle DSH statute does

violence to its plain language, its purpose and this Court's precedent. Because of the critical importance of this statutory provision to safety-net hospitals and the low-income and indigent populations that they serve, this Court should accept this petition and correct the Court of Appeals' plain error.

II.

THE SECRETARY'S INTERPRETATION OF THE PICKLE DSH STATUTE IS CONTRARY TO ITS PLAIN LANGUAGE, ITS PURPOSE AND THIS COURT'S PRECEDENT.

A. Standard of Review.

This Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778 (1984) controls review of an agency's interpretation of a statute it administers. Under the two-pronged inquiry required by *Chevron*, the first question is "whether Congress has directly spoken to the precise question at issue. *If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.*" 467 U.S. at 842-843, 104 S. Ct. at 2781 (emphasis added). If the statute, however, is silent or ambiguous with regard to the issue, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843, 104 S. Ct. at 2782.

In addressing the first step of the *Chevron* analysis, the reviewing court must employ the traditional tools of statutory construction to determine whether Congress has spoken to

the issue. 467 U.S. at 843 n.9, 104 S. Ct. at 2782 n.9. Among the traditional tools of statutory construction are the statute's text, its legislative history, its purpose, and the canons of statutory construction. *See, e.g., Dole v. United Steel Workers of America*, 494 U.S. 26, 34, 110 S. Ct. 929, 934 (1990) (noting traditional tools of statutory construction include statute's language, structure, and purpose); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 300, 108 S. Ct. 1811, 1822 (1988) (noting that statute's purpose and legislative history are traditional tools of statutory construction).

B. The Secretary's interpretation of the Pickle DSH statute conflicts with its plain language and fails to accord the statute's words their common, ordinary meaning.

The lynchpin of the dispute is whether net inpatient care revenues attributable to Medicare and Medicaid should be excluded only from the numerator or from both the numerator and the denominator of the Pickle DSH adjustment. The Pickle DSH statute's language provides that a hospital qualifies for a Pickle DSH adjustment when it is located in an urban area, has 100 or more beds, and it can demonstrate:

> [I]ts net inpatient care revenues (excluding any of such revenues attributable to [Medicare] or [Medicaid]), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceed 30 percent of its total *of such* net inpatient care revenues during the period.

42 U.S.C. § 1395ww(d)(5)(F)(i)(II) (emphasis added). In the statute's plain language, then, through use of the words "of such," Congress excludes Medicare and Medicaid revenues from *both* the numerator and denominator of the Pickle equation.

The Court of Appeals, however, adopted the Secretary's position that the use of the word "such" in the phrase "total of such net inpatient care revenues" need not necessarily be construed according to its commonly understood meaning.

"Courts properly assume, absent sufficient indication to the contrary, that Congress intends words in its enactments to carry 'their ordinary, contemporary, common meaning.' " *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 388, 113 S. Ct. 1489, 1495 (1993) (*quoting Perrin v. United States*, 444 U.S. 37, 42, 100 S. Ct. 311, 314 (1979)). The ordinary meaning of the word "such" is defined as follows:

> Of that kind, having particular quality or character specified. Identical with, being the same as what has been mentioned. Alike, similar, of the like kind. "Such" represents the object as already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last antecedent.

BLACK'S LAW DICTIONARY 1432 (6th ed. 1990). Applying this definition, the second reference to "*such* net inpatient care revenues" in the Pickle DSH statute must, by its plain meaning, encompass the material in the previous parenthetical phrase defining "net inpatient care revenues." The parenthetical defines, or particularizes, "net inpatient care revenues" as "excluding any such revenues attributable to [Medicare] or [Medicaid]." Rather than repeat that rather cumbersome phrase, Congress quite sensibly substituted the second reference to "such" for it.

This construction of the Pickle DSH statute is consistent with this Court's similar decision in *United States v. Bowen*, 100 U.S. 508 (1879). In *Bowen*, this Court was called upon to interpret a statute regarding military pensions. The statute read, in pertinent part:

> the fact that one to whom a pension has been granted for wounds or disability received in the military service has not contributed to the funds of the Soldiers' Home, shall not preclude him from admission thereto. But *all such pensioners* shall surrender their pensions to the Soldiers' Home during the time they remain there and voluntarily receive its benefits.

Id. at 511 (emphasis added).

The government contended that this statutory passage meant that *all pensioners* had to surrender their pensions while they were residents of the Soldiers Home, while the plaintiff pensioner contended that the obligation to surrender the pension during residency applied only to "such pensioners" who had not contributed to the funds of the Soldiers' Home before entry into the same.

This Court defined the issue in *Bowen* as "whether we shall read the section 'all pensioners' or 'all such pensioners,' " *id.* at 512, and then sided with the plaintiff pensioner. In so doing, this Court reasoned that "there is no other class of pensioners described in that section to whom the word such can refer than to those who have not contributed to the funds of the home," *id.*, and concluded that "the word [such] . . . has an appropriate reference to the class of pensioners who have not contributed to the funds of

the institution, and *no sound canon of construction will authorize us to disregard it, when to do so changes very materially the meaning of this section.*" *Id.* at 513 (emphasis added).

The question presented by this case is similar to that presented in *Bowen*: will the Pickle DSH statute be read as "total of such net inpatient revenues" (as it is written) or as "total net inpatient revenues" (as it is not written). In this statutory scheme, the phrase "of such" has an "appropriate reference" to its antecedent, "net inpatient revenues (excluding any of such revenues attributable to [Medicare] or [Medicaid])," and "no sound canon of construction" authorized the Secretary or the Court of Appeals to disregard it, especially when it is conceded that doing so dramatically alters the statute's meaning. *See North Broward*, 172 F.3d at 93 (Appendix C at 23a) ("The practical differences between the Secretary's interpretation and that advanced by North Broward and accepted by the district court are significant. . . . [A]dopting North Broward's interpretation would likely increase the number of providers qualifying for the disproportionate share adjustment in the [Pickle] provision.").

Contrary to this Court's precedent and the ordinary meaning of the word "such," however, the Secretary and the Court of Appeals adopted a different interpretation of the phrase "of such." The court *conceded* that the word "such" "often serves the particularizing role envisioned by North Broward and the district court." *North Broward*, 172 F.3d at 95 (Appendix C at 30a). The court also acknowledged that the BLACK'S LAW DICTIONARY definition of the word "such," advanced by the *North Broward* Petitioners, was the more common, ordinary definition. *Id.* at 96 (Appendix C at 32a) ("Given a choice between attributing to 'such' the simple

referential function described by the Secretary or a particularizing function, *we might ordinarily be inclined to choose the latter, which arguably gives 'such' a more meaningful role.*") (Emphasis added). The court nonetheless refused to apply the word's common meaning, on the basis that the Secretary's more obscure interpretation of the word "such" was not unreasonable. *Id.* (Appendix C at 39a).

In adopting this view, the court erred. Under this Court's unambiguous precedent, words are to be given their ordinary, common meaning. Once the court had properly identified the ordinary, common meaning of the word "such," it could not disregard that meaning.

Here, the statute's language, purpose and legislative history all strongly support the position that "such" was intended to have its ordinary meaning. Indeed, Congress eradicated any doubt of the statute's meaning in its 1987 amendment to the statute in the Omnibus Budget Reconciliation Act ("OBRA"), Pub. L. No. 100-203, 101 Stat. 1330 (1987). In the portion of the House Conference Report summarizing the substantive elements of the House version of OBRA, the purpose and intended effect of the amendment to the Pickle DSH payment was addressed:

> (2) Disproportionate Share Hospitals. — *Clarifies* that a hospital would qualify if more than 30 percent of its net inpatient care revenues (excluding any Medicare or Medicaid revenues) are provided by State and local government payments for indigent care.

H.R. Conf. Rep. No. 100-495, at 545 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1291 (emphasis added). Moreover, the Conference Report indicates that the Senate offered no

amendments that addressed the DSH payment and that the final conference agreement included the House provisions. H.R. Conf. Rep. No. 100-495, at 547-48 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1293 to 2313-1294. "The clarity of this expression cannot be mistaken." *The Cambridge Hosp. v. Shalala*, Civ. Action No. 95-1310 (D.D.C. June 8, 1998) (Appendix B at 15a).

Compounding its erroneous refusal to apply the Pickle DSH statute's language and the plain meaning of the word "such," the court deferred to the Secretary's more obscure interpretation. Deference to the Secretary, however, is only appropriate *after* the court determines whether the intent of Congress, based on the statutory language *and* application of the traditional tools of statutory construction, is clear. Here, this canon of construction should have been applied without reference or regard to the Secretary's competing, alternative definition.

Because the Court of Appeals' decision is contrary to the statute's plain language and this Court's precedent, further review of its decision is warranted.

C. The Secretary's interpretation is inconsistent with this Court's mandate that, where possible, every word in a statute must be given effect.

Courts must, where possible, give operative effect to every word in the statute. *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 209, 117 S. Ct. 660, 664 (1997); *Crandon v. United States*, 494 U.S. 152, 170, 110 S. Ct. 997, 1008 (1990) ("It is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect.") (Scalia, O'Connor and Kennedy, JJ., concurring).

The Secretary's reading of the Pickle DSH statute, adopted by the Court of Appeals, violates this well-established rule of construction. The Secretary's interpretation reads Congress's deliberate use of the words "of such" out of the statute: it makes no distinction between use of the phrase "total *of such* net inpatient revenues" (which Congress chose to use) and use of the phrase "total net inpatient revenues" (which Congress chose *not* to use). *See North Broward*, 997 F. Supp. at 46 ("Without [the second 'such'], the denominator reads 'total net inpatient care revenues.' If added, the term 'of such' becomes surplusage because the denominator already expresses the meaning [HCFA] ascribes to 'of such,' namely, that the denominator includes all net inpatient care revenues. Because courts should seek to avoid treating statutory terms as surplusage, the Secretary's construction cannot attach to the Pickle denominator."); *see also The Cambridge Hosp. v. Shalala*, Civ. Action No. 95-1310 (D.D.C. June 8, 1998) (Appendix B at 10a) ("The Secretary contends that the denominator's term 'total of such net inpatient revenues' refers to the phrase 'net inpatient revenues' without the modifying parenthetical that excludes Medicare and Medicaid payments. To adopt this interpretation, however, would be to deviate from the Supreme Court's instruction that in construing a statute we are obliged to give effect, if possible, to every word that Congress used. The Secretary's interpretation deprives the phrase 'of such' of all operative significance. . . .") (internal quotations and citations omitted).

Had Congress drafted the Pickle DSH statute differently, omitting the second appearance of the word "such," then the Pickle denominator would be as the Secretary suggests. Congress did not so choose, however, and the Secretary's interpretation thwarts Congress's decision. *Id.* (Appendix B

at 11a) ("Put simply, if Congress meant 'total net inpatient care revenues,' it would have said so.")

The Secretary's construction is also impermissible, because it would render the Pickle DSH statute redundant and nonsensical. *See Landgraff v. USI Film Products*, 511 U.S. 244, 258, 114 S. Ct. 1483, 1493 (1994) (acknowledging canon of construction that court should give effect to every provision of statute to avoid redundancy among different provisions). Under the Secretary's interpretation, the parenthetical phrase excluding Medicare and Medicaid revenues applies only to the numerator of the Pickle DSH fraction, not to the denominator. But, other statutory language in that section of the statute *already* makes plain that the numerator of the fraction does not include Medicare revenues.

The statute specifically defines the revenues to be included in the numerator as revenues "for *indigent care* from *State and local government sources*." 42 U.S.C. § 1395ww(d)(5)(F)(i)(II) (emphasis added). Hospitals, however, receive Medicare revenues solely from the *federal government*, *not* from State and local government sources. Moreover, Medicare revenues are *not* for indigent care.[4] Thus, under the existing definition of the numerator, Medicare revenues would not be included in the numerator *even without the statutory exclusion of Medicare revenues*.

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4. Unlike Medicaid, which is a means-tested welfare program, Medicare is a health insurance program. Indigence, relevant for purposes of Medicaid qualification, has no bearing on whether a person qualifies for Medicare. 42 U.S.C. §§ 426, 1395c.

The Secretary's interpretation, therefore, asks the Court to treat as surplusage, or a redundancy, the statutory exclusion of Medicare revenues from the Pickle DSH numerator, a numerator from which these revenues are already — by definition — excluded. This result fails to give effect to every word and phrase in the statute. The construction is plainly unsound.

D. The Secretary's interpretation of the Pickle DSH statute is contrary to Congress's overt and stated purpose in creating the Pickle DSH adjustment.

In creating the DSH program, Congress aimed to ensure ongoing access to care for low-income Medicare beneficiaries and for all beneficiaries who reside in areas with substantial low-income and indigent populations by helping hospitals which treat significant numbers of these populations survive. To achieve these goals, as noted above, Congress developed two distinct tests under which a hospital could qualify for a supplemental DSH payment: the proxy test and the Pickle test.

While the proxy test was specifically designed to track SSI and Medicaid utilization, the Pickle DSH calculation was created to address the plight of those hospitals that treat a disproportionate number of non-SSI, non-Medicaid indigent patients. The legislative history of the Pickle DSH statute plainly states that its purpose was to provide an alternative DSH test that tracked and assisted hospitals who bear a disproportionate burden of treating non-SSI, non-Medicaid indigents:

> Because of concern that this [the proxy test] might *substantially understate the presence of low-*

> *income patients in some hospitals*, most particularly public hospitals in states where the Medicaid eligibility standards are stringent, [the Pickle Amendment] also includes a limited exceptions process for such hospitals.[5]

H.R. Rep. No. 99-241, pt. 1 at 18 (1985), *reprinted* in 1986 U.S.C.C.A.N. 579, 596 (emphasis added).

Thus, in its design of the Pickle DSH adjustment, Congress recognized that certain hospitals serving the uninsured population were unlikely to be adequately assisted under the proxy test, which keyed the assistance it provides to Medicare and Medicaid utilization. Accordingly, Congress designed an alternative test, the Pickle DSH adjustment, which eliminated consideration of Medicare and Medicaid revenues in favor of other measures of indigency. Indeed, it would have been completely contrary to Congress's stated objective in creating the Pickle DSH adjustment as an alternative to the proxy test to rely heavily on the presence

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5. In this quotation, it is important to understand the reference to states where Medicaid eligibility standards are stringent. Because Medicaid is a joint federal/state program, states possess tremendous discretion (within broad federal guidelines) in setting the requirements for Medicaid eligibility. Thus, some states may provide an extremely narrow definition of indigence for Medicaid purposes, whereas other states may more broadly determine indigency for purposes of Medicaid. In states where eligibility standards are stringent, more patients who are indigent will be unable to qualify for the state's Medicaid program. Thus, a DSH methodology keyed only to Medicare and Medicaid usage would substantially underserve safety-net hospitals in states where fewer indigent patients qualify, by virtue of the state-structured eligibility requirements, for the state's Medicaid program. To address this disparity, Congress created the Pickle DSH methodology.

of Medicare and Medicaid revenues. The Secretary's interpretation, however, and the Court of Appeals' adoption of the same, contradicts Congress's stated purpose in creating the Pickle DSH adjustment. Their interpretation of the statute gives significant weight to a hospital's Medicare and Medicaid revenues, a factor Congress specifically sought to eliminate from the Pickle equation. Cambridge respectfully asks this Court to accept this petition to review the Court of Appeals' decision so that Congress's purpose may be effectuated.

CONCLUSION

This Court should accept the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AND FILED AUGUST 2, 1999

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-5426

September Term, 1998
95cv01310

The Cambridge Hospital,

Appellee

v.

Donna E. Shalala, Secretary, Department of Health & Human Services,

Appellant

BEFORE: Ginsburg, Henderson, and Garland, Circuit Judges

ORDER

Upon consideration of the motion to vacate and remand for further proceedings, and the opposition thereto; and the motion to continue to hold case in abeyance, it is

Appendix A

ORDERED that the motion to continue to hold case in abeyance be dismissed as moot. Appellee requests that the case be held in abeyance pending issuance of the mandate in *North Broward Hospital District v. Shalala*, 172 F.3d 90 (D.C. Cir. 1999). By order filed July 6, 1999, this court denied rehearing and rehearing en banc in *North Broward Hospital District v. Shalala*. The mandate issued on July 14. It is

FURTHER ORDERED that the motion to vacate and remand for further proceedings be granted. The district court's judgment filed June 8, 1998, is hereby vacated, and the case remanded for further proceedings in light of *North Broward Hospital District v. Shalala*.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

s/ DG
s/ KLH
s/ MG

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED JUNE 8, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-1310 (CKK)

THE CAMBRIDGE HOSPITAL,

Plaintiff,

v.

DONNA E. SHALALA, Secretary, United States Department of Health and Human Services,

Defendant.

MEMORANDUM OPINION

This case requires the Court to determine whether the Secretary of Health and Human Services erred when she determined that Plaintiff Columbia Hospital [*sic*] did not qualify for additional Medicare payments pursuant to 42 U.S.C. § 1395ww(d)(5)(F)(i)(II). Pending before the Court are Plaintiff's and Defendant's cross motions for summary judgment and corresponding opposition and reply memoranda. After reviewing carefully the arguments, pleadings, and exhibits, the Court concludes that the Secretary's interpretation of § 1395ww(d)(5)(F)(i)(I) contradicts the manifest statutory language and congressional

intent. Accordingly, judgment shall be entered in favor of The Cambridge Hospital.

I. BACKGROUND

Title XVIII of the Social Security Act, 42 U.S.C. § 1395 *et seq.*, establishes the Medicare program, which pays for medical care to qualifying aged and disabled individuals. Subdivided into two principal parts, the Medicare program authorizes payment for both institutional care, including hospital and related post-hospital services (Part A), *see* 42 U.S.C. §§ 1395c-1395i-4, as well as physicians' and other non-hospital supplemental services (Part B), *see* 42 U.S.C. §§ 1395j-1395w-4. This case involves Medicare payments for hospital services pursuant to Part A.

Before October 1, 1983, the Medicare program reimbursed hospital services on a "reasonable cost" basis for services rendered. *See* 42 U.S.C. § 1395f(b). Congress abandoned this calculus in 1983; since then, a system designated as the Prospective Payment System ("PPS") has governed Medicare reimbursement for inpatient hospital services. *See* 42 U.S.C. § 1395ww(d). Under PPS, hospitals are compensated at a prospectively determined amount based on the beneficiary's diagnosis at the time of discharge. The PPS payment, however, is not uniform. Rather, Congress has established a number of conditions under which hospitals may qualify for adjusted payments. Among the variables that may mandate an augmented PPS payment are the geographic location of a hospital, the existence of professional training programs, and the number of low-income patients that a hospital serves. *See id.*

Appendix B

In 1985 Congress enacted the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 100 Stat. 158 (1986), which provided for additional payments to hospitals that serve a "disproportionate share" of indigent and low-income patients. Qualifying hospitals, known as disproportionate share hospitals ("DSH"), could receive this payment by two different methods of calculation: the proxy method and the Pickle method. Under the proxy method, a hospital would qualify for a DSH payment if a percentage of a hospital's total inpatient care days were dedicated to Medicare, supplemental security income, and state Medicaid recipients. *See* 42 U.S.C. § 1396ww(d)(5)(F)(i)(I). Congress developed the alternative Pickle method in order to remedy certain inequities that the proxy method might produce. Because individual states may prescribe disparate qualifications for Medicaid recipients, the proxy method could potentially distort the true volume of low-income patients served by hospitals. Therefore, under the Pickle method, named for Representative J.J. Pickle, a hospital could qualify for a DSH payment if a certain percentage of its net inpatient care revenues were attributable to indigent care.

> Because of concern that this proxy measure of low income status might substantially understate the presence of low-income patients in some hospitals, most particularly public hospitals in states where the medicaid eligibility standards are stringent, this provision also includes a limited exceptions process for such hospitals.

H.R. Rep. No. 241, 99th Cong. 18, *reprinted in* 1986 U.S.C.C.A.N 579, 596.

Appendix B

The Pickle method provides for a DSH adjustment to a hospital if it is

> located in an urban area, has 100 or more beds, and can demonstrate that its net inpatient care revenues (excluding any of such revenues attributable to this Title [Medicare] or State plans approved under Title XIX [medicaid]), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceed 30 percent of its total of such net inpatient care revenues during the period.

42 U.S.C. § 1395ww(d)(5)(F)(i)(II). The Secretary soon thereafter promulgated regulations interpreting how to calculate the fraction under the Pickle Method. Under these regulations, the numerator was defined to consist of net inpatient care revenues from State and local governments that are "in fact used for indigent care." 51 Fed. Reg. 31454, 31458 (Sept. 3, 1986). This definition excluded payments from State and local governments for indigent care that were spent on operating deficits or otherwise not "in fact used for indigent care." *Id.* The denominator was defined as consisting of all moneys received for indigent care, including Medicare and Medicaid payments. That is to say, the Secretary interpreted the phrase "total of such net inpatient care revenues" to mean total net inpatient care revenues — disregarding the parenthetical exclusion of Medicare and Medicaid that modifies the numerator. *See* 42 C.F.R. § 412.106(b)(1)(ii) (1987).

Appendix B

The Cambridge Hospital is a public hospital and provider of services that is also eligible for Medicare reimbursements under 42 U.S.C. § 1395x(e), (u). *See* Compl. ¶1, Answer ¶1. For its fiscal year ending June 30, 1990, Plaintiff filed for a Pickle Adjustment with a fiscal intermediary of the Health Care Financing Administration ("HCFA"), which denied the Hospital's petition for an adjustment. The HCFA reasoned that under the Secretary's interpretation of the Pickle calculation, the Plaintiff did not meet the 30 percent threshold. Compl. ¶13. Plaintiff then filed an appeal with the Provider Reimbursement Review Board ("PRRB") pursuant to 42 U.S.C. § 1395oo(f)(1), claiming that the Secretary's interpretation of the Pickle Method was erroneous as a matter of law and that they actually deserved a Pickle DSH adjustment. The PRRB took jurisdiction of the matter, determined that there was an issue of law that it lacked authority to address, and certified the plaintiff's appeal for expedited judicial review pursuant to 42 U.S.C. § 1395oo(f)(1).[1]

Plaintiff then filed a Complaint on July 17, 1995, in which it challenges the Secretary's interpretation of the Pickle Method for DSH adjustments. Plaintiff asserts that the Secretary's interpretation of both the numerator and the denominator are contrary to the plain language of the statute and legislative history, or in the alternative that they are arbitrary and capricious. Compl. ¶1. If either plaintiff's

1. Parties are entitled to judicial review if they have exhausted their administrative remedies before the PRRB. *See* 42 U.S.C. § 1395oo(f). Expedited judicial review is proper where the PRRB finds that it has jurisdiction over a case but cannot review the matter because it involves an issue of law. *See* 42 U.S.C. § 1395oo(f)(1).

interpretation of the numerator or denominator is correct, then plaintiff will qualify for a Pickle DSH adjustment. Pl.'s Mot. for Summ. J. at 13.

II. STANDARD OF REVIEW

The Supreme Court's seminal decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), governs the review of an agency's interpretation of a statute for which it is responsible for administering. *See Bell Atlantic Tele. Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997). Bifurcated into two separate inquiries, *Chevron*'s first prong mandates that a reviewing court must "exhaust the 'traditional tools of statutory construction' to determine whether Congress has spoken to the precise question at issue." *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9). Among these traditional tools are examinations that probe the statute's text, legislative history, and structure, *see Southern Cal. Edison Co. v. FERC*, 116 F.3d 507, 515 (D.C. Cir. 1997), as well as its purpose, *see First Nat'l Bank & Trust v. National Credit Union*, 90 F.3d 525, 529-30 (D.C. Cir. 1996). By employing these traditional tools of statutory construction, "[i]f the court can determine congressional intent, then that interpretation must be given effect." *Natural Resources Defense Council*, 57 F.3d at 1125. Therefore, so long as "an accepted canon of construction illustrates that Congress had a specific intent on the issue in question, then the case can be disposed of under the first prong of *Chevron*." *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1238, 1292-93 (D.C. Cir.), *aff'd by equally divided Court*, 493 U.S. 38 (1989). Only if the statute

is ambiguous must the Court continue to step two, which requires the Court to "defer to a permissible agency construction of the statute." *Natural Resources Defense Council*, 57 F.3d at 1125.

III. PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER PRONG ONE OF *CHEVRON* BECAUSE THE SECRETARY'S INTERPRETATION OF THE DENOMINATOR OF THE PICKLE FRACTION IS UNREASONABLE.

It is "[a]n endlessly reiterated principle of statutory construction . . . that all words in a statute are to be assigned meaning, and that nothing therein is to be construed as surplusage." *Qi-Zhuo v. Meisner*, 70 F.3d 136, 139 (D.C. Cir. 1995) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). In the case at bar, the Court is called upon to interpret the Pickle adjustment's use of the word "such" in a manner that does not render it "either superfluous or meaningless." *Benavides v. DEA*, 968 F.2d 1243, 1248 (D.C. Cir. 1992). The Pickle adjustment provides that a hospital is eligible for a DSH adjustment if it:

> is located in an urban area, has 100 or more beds, and can demonstrate that its *net inpatient care revenues* (excluding any of such revenues attributable to this title [Medicare] or State plans approved under title XIX [Medicaid]), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceeds 30 percent of its *total of such net inpatient care* revenues during the period.

42 U.S.C. § 1395ww(d)(5)(F)(i)(II)) (emphasis added). By distilling the language of this provision, it is clear that the Pickle adjustment is based on a mathematic fraction. To calculate whether a hospital qualifies for a DSH payment, the numerator is expressed as the hospital's net inpatient care revenues (excluding any of such revenues attributable to Medicare or Medicaid). The denominator is measured by the "total of such net inpatient care revenues." *Id.* To receive a DSH payment then, a hospital must demonstrate that the numerator's value exceeds 30 percent of the denominator. When stated this abstractly, the Pickle method generates no controversy. The Cambridge Hospital and the Secretary, however, disagree over which specific variables Congress intended to include and exclude from the Pickle fraction. Specifically, the question to resolve is whether the parenthetical exclusion of Medicare and Medicaid payments that modifies the phrase "net inpatient care revenues" in the numerator also modifies the denominator's reference to the "total of such net inpatient care revenues."

The Secretary contends that the denominator's term "total of such net inpatient care revenues" refers to the phrase "net inpatient care revenues" without the modifying parenthetical that excludes Medicare and Medicaid payments. To adopt this interpretation, however, would be to deviate from the Supreme Court's instruction that "in construing a statute we are obliged to give effect, if possible, to every word that Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The Secretary's interpretation deprives the phrase "of such" of all operative significance. By her reading, there is no difference between "total *of such* net inpatient care revenues" and "*total* net inpatient care

revenues." This construction impermissibly excises an essential demonstrative adjective from the statute. If Congress had meant to specify "total net inpatient care revenues," it would not have included the modifying phrase "of such." Put simply, if Congress meant "total net inpatient care revenues," it would have said so.

Unlike the Secretary's interpretation, the construction forwarded by Cambridge Hospital assigns substantive meaning to "such." The Plaintiff argues that the plain language of the statute indicates that the numerator's exclusion of Medicare and Medicaid payments also modifies the denominator. That is to say, by using the phrase "total of such net inpatient care revenues," Congress was referring to the antecedent phrase "net inpatient care revenues" as modified by the parenthetical that immediately follows those four words. Not only is this interpretation more tenable than the Secretary's, but it also gives effect to every word in the Pickle adjustment. Under the Secretary's theory, "total" modifies "net inpatient care revenues." By contrast, Cambridge Hospital's interpretation construes "total" to modify "*such* net inpatient care revenues." This is most certainly a distinction with a very real difference. According to Black's Law Dictionary, "such" denotes: "Of that kind, having particular quality or character specified. Identical with, being the same as what has been mentioned." BLACK'S LAW DICTIONARY 1432 (6th ed. 1990). It also "represents the object as already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last antecedent." *Id.* Here, the antecedent is "net inpatient care revenues." Congress "particularized" this phrase by attaching to it the parenthetical that excludes

Medicare and Medicaid revenues from the calculation. By later referring to the "total of *such* net inpatient care revenues," Congress was invoking the antecedent phrase "net inpatient care revenues" as particularized by the parenthetical. Notably, another district court within this jurisdiction has recently found the Secretary's interpretation of the denominator in the Pickle fraction to violate the plain meaning of the statute. *See North Broward Hosp. Dist. v. Shalala*, __ F. Supp. __, 1998 WL 125699, at *3-*4 (D.D.C. Mar. 9, 1998). There, Judge Stanley Harris concluded that, based on cardinal canons of statutory construction and the technical meaning of "such," "[t]he denominator must incorporate the parenthetical phrase excluding Medicare and Medicaid revenues because that phrase modifies 'net inpatient care revenues.' " *Id.* at *3.

The Secretary attempts to salvage her interpretation by relying on other canons of statutory interpretation. First, she refers to the original version of the Pickle Amendment, which employed the phrase "total of such revenues" in the denominator rather than the current language of "total of such net inpatient care revenues." Comprehensive Omnibus Budget Reconciliation Act of 1995 ("COBRA"), Pub. L. No. 99-272, § 9105(a), 100 Stat. 158 (1986). She then defines the term "total of such revenues" by referring to the earlier use of the phrase "such revenues" and determining that they must have the same meaning if used in the same provision. *See United States National Bank of Oregon v. Independent Ins. Agents of America*, 113 S. Ct. 2173, 2185 (1993) (holding that identical words used in a statute will be construed to have the same meaning unless context indicates to the contrary). Since the earlier use of the term "such revenues"

refers to the phrase "net inpatient care revenues" without the modifying parenthetical, she argues that the second occurrence of the phrase "such revenues" must as well. In essence, the Secretary assigns the same meaning to the two underscored phrases:

> net inpatient care revenues (excluding any of *such revenues* attributable to this title [Medicare] or State plans approved under title XIX [Medicaid]), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceeds 30 percent of its total of *such revenues* during the period.

42 U.S.C. § 1395ww(d)(5)(F)(i)(II) (emphasis added). In this way, the Secretary contends, the statute clearly states that the denominator is to include total net inpatient care revenues (*including* Medicare and Medicaid revenues) because both phrases refer solely to the pre-parenthetical phrase "net inpatient care revenues."

Whatever merit attaches to the Secretary's interpretation of the COBRA, the plain language of the amended and current provision cannot bear such a construction. Lest it be too obvious to warrant mention, the original COBRA language upon which the Secretary relies was amended one year later by the Omnibus Budget Reconciliation Act ("OBRA"), Pub. L. No. 100-203, 101 Stat. 1330 (1987). As already set forth in this Memorandum Opinion, the plain language of the current provision, buttressed by the fundamental canon of statutory interpretation that mandates that effect be given all words in a statute, belies the Secretary's interpretation.

Appendix B

The Secretary argues that Congress specifically left unchanged her interpretation of the denominator, leaving the word "such" in the statute solely to maintain "parallelism" with the syntax of COBRA. This is a reading that the language of the statute and the actions of Congress cannot bear. An interpretation that construes the operative word "such" to be simply a tool to maintain some ambiguous and abstract concern for parallelism is a "reading [that] plainly violates the familiar doctrine that the Congress cannot be presumed to do a futile thing." *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997); *see also Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344-45 n.6 (D.C. Cir. 1996) ("We will not . . . assume that Congress intended for that jurisdiction[al] [provision] to be meaningless."); *Benavides v. DEA*, 968 F.2d 1243, 1248 (D.C. Cir. 1992) (rejecting Attorney General's interpretation of statutory provision because it would make provision "either superfluous or meaningless"). As between the grammatically sound and eminently sensible interpretation that Cambridge Hospital has advocated and the Secretary's interpretation, which depends on agile feats of linguistic and mental acrobatics that find no support in traditional canons of statutory construction, *Chevron*'s first prong requires the Court to reject the Secretary's position.

Where, as here, the plain language of the statute is clear, the Court typically will not probe further to divine its meaning, *see Norfolk & W. Ry. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991); *Lever Bros. Co. v. United States*, 877 F.2d 101, 105 (D.C. Cir. 1989), absent "a clearly expressed legislative intent to the contrary." *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). Not

only is the legislative history marshaled by the Secretary ambiguous at best, but a portion of the House Conference Report that apparently eluded counsel for both parties, underscores Congress's manifest intent to exclude Medicare and Medicaid from the denominator. In summarizing the substantive elements of the House version of OBRA, the Conference Report explicitly addressed the purpose and intended effect of the amendment to the DSH payment:

> (2) Disproportionate Share Hospitals. — *Clarifies* that a hospital would qualify if more than 30 percent of its net inpatient care revenues (excluding and Medicare or medicaid revenues) are provided by State and local government payments for indigent care.

H.R. 100-495, 100th Cong. 545, *reprinted in* 1987 U.S.C.C.A.N. 2313-1291 (emphasis added). The clarity of this expression cannot be mistaken. The House Bill sought to "clarify" that the DSH payment should be calculated by excluding Medicare and Medicaid revenues from the denominator of the Pickle fraction. Notably, the Conference Report indicates that the Senate offered no amendments that addressed the DSH payment, *see id.* at 547, and that the final "conference agreement includes the House provisions." *Id.* at 548. Contrary to the Secretary's opinion, the legislative history appears squarely in tension with her interpretation. The Secretary can argue, at best, that the legislative histories of COBRA and OBRA present an ambiguous sketch of congressional intent. Yet, "in the realm of legislative interpretation, inconsistent history certainly cannot override plain language." *Qi-Zhuo v. Meissner*, 70 F.3d 136, 140 (D.C.

Cir. 1995). Here, the legislative history does not evince an unmistakable congressional intent to do something other than what the plain language of the statue prescribes: to exclude Medicare and Medicaid payments from the denominator of the Pickle calculus.

IV. CONCLUSION

Because the Secretary's interpretation of the denominator of the Pickle DSH method undermines the clear intent of Congress in enacting the statute, Plaintiff is entitled to judgment as a matter of law. Plaintiff's motion for summary judgment will be granted. Defendant's motion for summary judgment will be denied. By deciding this issue in Plaintiff's favor, the Court need not address the remainder of claims presented by Cambridge Hospital's Complaint.

June 8, 1998

s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 95-1310 (CKK)

THE CAMBRIDGE HOSPITAL,

Plaintiff,

v.

DONNA E. SHALALA, Secretary, United States Department of Health and Human Services,

Defendant.

ORDER

For the reasons expressed in the accompanying Memorandum Opinion, it is, this 8 day of June 1998, hereby

ORDERED that Plaintiff's Motion for Summary Judgment [#14] shall be, and hereby is, **GRANTED**; and it is

FURTHER ORDERED that Defendant's Motion for Summary Judgment [#21] shall be, and hereby is, **DENIED**; and it is

FURTHER ORDERED that, in calculating disproportionate share payments pursuant to 42 U.S.C. § 1395ww(d)(5)(F)(i)(II), the Secretary shall exclude

Medicare and Medicaid payments from the denominator of the applicable fraction; and it is

FURTHER ORDERED that **JUDGMENT** shall be, and hereby is, entered in favor of Plaintiff in the above-captioned action.

SO ORDERED.

s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN *NORTH BROWARD HOSPITAL DISTRICT, et al. v. DONNA E. SHALALA, etc.*, NO. 98-5164 DATED AND DECIDED APRIL 27, 1999

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 8, 1999 Decided April 27, 1999

No. 98-5164

NORTH BROWARD HOSPITAL DISTRICT, ET AL.,

APPELLEES

v.

DONNA E. SHALALA, SECRETARY,
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,

APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 96cv00076)

* * *

Before SILBERMAN, SENTELLE, and RANDOLPH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SENTELLE.

Appendix C

SENTELLE, *Circuit Judge*: Congress has authorized Medicare reimbursement at a higher than usual rate to certain large urban hospitals that receive significant state and local funding apart from Medicaid and Medicare revenues. The Secretary of Health and Human Services ("HHS") appeals a decision of the district court rejecting her interpretation of the qualifications for eligibility under this provision. *See North Broward Hosp. Dist. v. Shalala,* 997 F. Supp. 41 (D.D.C. 1998). Finding the statute ambiguous and the Secretary's interpretation reasonable, we reverse.

I.

In 1983, Congress began to phase out the existing cost-based Medicare reimbursement system, *see* 42 U.S.C. § 1395f(b)(1); *Methodist Hosp. of Sacramento v. Shalala,* 38 F.3d 1225, 1227 (D.C. Cir. 1994), and to phase in a "prospective payment" system providing reimbursement according to pre-determined rates based on diagnosis and geographic location. *See* Social Security Amendments of 1983, Pub. L. No. 98-21, § 601, 97 Stat. 65, 149 (1983) (codified as amended at 42 U.S.C. § 1395ww). In 1986, recognizing that special adjustments might be needed for hospitals serving an unusually large number of low-income individuals, Congress crafted provisions implementing "disproportionate share" adjustments for such hospitals. *See* The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, § 9105, 100 Stat. 82, 158 (1986). These disproportionate share adjustments provide for additional Medicare payments for hospitals that qualify on either of two grounds. Hospitals typically qualify for an adjustment by showing that they serve a

disproportionate number of low-income patients based on the proportion of inpatient days attributable to Medicaid patients and to Medicare patients qualifying for Supplemental Security Income benefits.[1] *See* 42 U.S.C. § 1395ww(d)(5)(F)(i)(I), (v), (vi). Alternatively, under the provision at issue in this case, large urban hospitals can qualify by demonstrating that they receive state and local funding which exceeds a statutory threshold. Specifically, the statute provides for a disproportionate share adjustment for any hospital that

> is located in an urban area, has 100 or more beds, and can demonstrate that its net inpatient care revenues (excluding any of such revenues attributable to [Medicare or Medicaid]), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceed 30 percent of its total of such net inpatient care revenues during the period.

Id. § 1395ww(d)(5)(F)(i)(II). As originally enacted in 1986, this provision read just as it does now, except that the phrase "total of such net inpatient care revenues" read "total of such revenues." *See* COBRA § 9105(a)(F)(i)(II), 100 Stat. 82, 158. The change to the present wording was made by a 1987 amendment. *See* The Omnibus Budget Reconciliation Act of 1987 (OBRA), Pub. L. No. 100-203, § 4009(j)(3)(A), 101 Stat. 1330, 1330-59 (1987).

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1 Supplemental Security Income furnishes financial assistance to indigent persons who are aged, blind, or disabled. *See* 42 U.S.C. § 1381 *et seq.*.

Appendix C

The controversy in this case centers on the proper interpretation of the ratio specified in this provision. The single issue is whether the 30% set forth in the provision is a percentage of all net inpatient care revenues or whether it is a percentage of net inpatient revenues *excluding* revenues from Medicare and Medicaid. In other words, the question is whether the antecedent of "total of such net inpatient care revenues" is "net inpatient care revenues" or "net inpatient care revenues (excluding any of such revenues attributable to [Medicare or Medicaid])."

North Broward Hospital District ("North Broward"), doing business as Broward General Medical Center, North Broward Medical Center, and Imperial Point Medical Center, believed that the latter interpretation was correct, and that its facilities therefore qualified for the disproportionate share adjustment for fiscal years 1989-1991. However, the Medicare fiscal intermediary adhered to the former interpretation, and accordingly refused to make the more generous reimbursements to North Broward. North Broward appealed to the Provider Reimbursement Review Board ("PRRB") as specified in 42 U.S.C. § 1395oo(a), (h). The PRRB adopted the latter interpretation of the ratio, reversed the intermediary's decision, and held that the North Broward facilities qualified for the disproportionate share adjustment. Next, at the urging of the intermediary and HHS's Bureau of Policy Development ("BPD"), the Administrator of the Health Care Financing Administration ("HCFA"), acting as the Secretary's delegate, reversed the Board's decision, as permitted by 42 U.S.C. § 1395oo(f)(1) and 42 C.F.R. § 405.1875. The Administrator held that the provision contained "incontrovertible referential ambiguity" and that

the former interpretation, adopted by the BPD and the intermediary, was reasonable. Pursuant to 42 U.S.C. § 1395oo(f)(1), the hospitals sought review in the district court, which in turn reversed the Administrator's decision and granted summary judgment for North Broward. The district court held that the language of the provision is clear and unambiguous and that it requires the latter interpretation, urged by North Broward. 997 F. Supp. at 45, 48. The Secretary appeals from this ruling of the district court.

II.

The practical differences between the Secretary's interpretation and that advanced by North Broward and accepted by the district court are significant. As an illustration of the implications of the two interpretations, consider an example of a hospital whose total net inpatient care revenues are $100,000,000, of which $40,000,000 are Medicare and Medicaid revenues. Under North Broward's interpretation, which excludes Medicare and Medicaid revenues from the denominator of the ratio, the hospital would qualify for a disproportionate share adjustment under the provision at issue as long as it received more than $18,000,000 in state and local funding not attributable to Medicaid or Medicare, as illustrated by the following calculations:

Appendix C

North Broward's interpretation

Numerator = (State and local funding other than Medicare & Medicaid)
= $18,000,000

Denominator = (Net inpatient revenues, excluding Medicare & Medicaid)
= $100,000,000 – $40,000,000
= $60,000,000

The ratio is thus 18/60, or 30%.

Under the Secretary's interpretation, which does not exclude Medicare and Medicaid revenues from the denominator, the hospital would need to receive more than $30,000,000 of state and local funding not attributable to Medicaid or Medicare to qualify:

Secretary's interpretation

Numerator = (State and local funding other than Medicare & Medicaid) = $30,000,000

Denominator = (Total net inpatient revenues)
= $100,000,000

The ratio is thus 30/100, or 30%.

Given the sizable difference in the amount of state and local funding required to qualify under the two interpretations, adopting North Broward's interpretation would likely

increase the number of providers qualifying for the disproportionate share adjustment under the provision.[2]

Whether such an increase in the provision's applicability would be appropriate or desirable is a matter of policy, not of statutory construction, and within the bounds of congressional directive, it is primarily a question for HHS, not the courts. Because an agency's policy choices are necessarily constrained by the statute pursuant to which it acts, when an agency has interpreted a statute it administers, we first consider whether Congress has "directly addressed the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). If the intent of Congress is clear, it must be given effect. *Id.* However, if the intent of Congress is not clear, we do not impose our own construction of the statute, but instead examine only whether "the agency's answer is based on a permissible construction of the statute." *Id.* Thus, absent clear congressional intent to the contrary, we will defer to the Secretary's interpretation " 'if it is reasonable and consistent with the statute's purpose.' " *National Med. Enters., Inc. v. Shalala*, 43 F.3d 691, 695 (D.C. Cir. 1995) (quoting *Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 162-63 (D.C. Cir. 1990)). *See also HCA Health Servs. of Oklahoma, Inc. v. Shalala*, 27 F.3d 614, 616-17 (D.C. Cir. 1994); *Marymount Hosp., Inc. v. Shalala*, 19 F.3d 658, 661 (D.C. Cir. 1994).

North Broward advances two arguments that the usual *Chevron* analysis is inapplicable, neither of which we find

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2. According to HHS, fewer than a dozen facilities or hospital districts in the nation qualified under this provision in 1995. Secretary's Brief at 42; J.A. at 65.

convincing. First, North Broward argues that the Secretary's interpretation of the statute creating the ratio is not entitled to deference because it is not longstanding, noting that even the Administrator's decision characterized the regulations as silent with respect to the issue. We are somewhat puzzled by North Broward's argument, since the statutory interpretations of the agency's adjudicatory decision in this case would be entitled to deference even if the matter had never been addressed in regulations at all. *See Appalachian Regional Healthcare, Inc. v. Shalala*, 131 F.3d 1050, 1054 (D.C. Cir. 1997). There is certainly no argument that the Administrator's decision in this case is actually incompatible with the regulations. While perhaps not entirely unambiguous, the regulations describe the required ratio as 30 percent of "net inpatient care revenues" and are thus more consistent with the Secretary's interpretation of the statute than with the contrary position urged by North Broward. *See* 42 C.F.R. § 412.106(c)(2) (providing that the adjustment is available if a hospital "can demonstrate that, during its cost reporting period, more than 30 percent of its net inpatient care revenues are derived from State and local government payments for care furnished to indigent patients"). *See also* 51 Fed. Reg. 16,772, 16,776 (1986) (explaining that a qualifying hospital must show "that more than 30 percent of its total inpatient care revenues are from State and local government sources and that these revenues are specifically earmarked for the care of indigents").

Second, and even less convincingly, North Broward argues that the Secretary is not entitled to deference because of her "unremitting hostility" to disproportionate share adjustments in general. As evidence of this hostility, North

Broward notes that Congress's 1986 enactment of statutory disproportionate share adjustments arose in response to HHS's failure to implement acceptable adjustments by regulation, and that the House and Senate reports expressed dissatisfaction with the Secretary's nonresponsiveness. *See* H.R. Rep. No. 99-241, pt. 1, at 15-16 (1985); S. Rep. No. 99-146, at 291 (1985). As further evidence of the Secretary's alleged hostility to disproportionate share adjustments, North Broward points to cases rejecting the Secretary's interpretation of the statutory provisions governing disproportionate share adjustments based on a high proportion of low-income "patient days." *See, e.g., Cabell Huntington Hosp., Inc. v. Shalala*, 101 F.3d 984 (4th Cir. 1996); *Jewish Hosp., Inc. v. Secretary of HHS*, 19 F.3d 270 (6th Cir. 1994). Not surprisingly, North Broward cites no support for its suggestion that we should deny an agency *Chevron* deference because of our judicial assessment that it has been "hostile" to certain ideas. If an agency's "hostility" leads it to adopt an unreasonable interpretation of a statute, the interpretation will, if challenged, be rejected by the courts, as is perhaps illustrated by the cases cited by North Broward in which courts have rejected the Secretary's interpretation of the "patient-day" based disproportionate share mechanism. It is a far different thing to suggest that a court withhold deference to an agency's interpretation of a statute it administers on the basis of some sort of judicial "vote of no confidence" regarding the agency's actions on related matters. If Congress views HHS as "unremittingly hostile" to disproportionate share adjustments, it is free to decrease the agency's discretion in administering them or remove them from the agency's purview entirely. Absent such congressional intervention, administration of the

provision at issue is entrusted to HHS, and our review is that prescribed by *Chevron*.

Finally, North Broward urges that even if *Chevron* applies, we need not conduct a *Chevron* analysis, because regardless of our view of the statute, the final decision by the HCFA Administrator was arbitrary and capricious and therefore violated the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A); *see also* 42 U.S.C. § 1395oo(d) & (f)(1). In particular, North Broward relies on the fact that the Administrator's decision made reference to the fact that the phrase "such revenues" appears twice in the relevant sentence of the statute. North Broward accurately points out that while "such revenues" appeared twice in the statute before the 1987 amendment, it no longer does so — "such revenues" appears once, and "such net inpatient care revenues" appears once. Thus, appellees argue, the Administrator "did not even get the words of the statute right." North Broward Brief at 33. We find this argument hypertechnical. The Administrator's decision quoted the entire relevant statutory passage in two places, one immediately above the complained-of references to "such revenues." The statute was set forth correctly, with "such revenues" in one place and "su[illegible]net inpatient care revenues" in the other. In light of this, it seems clear that the Administrator's reference to the two occurrences of "such revenues" was simply a shortening of the latter phrase by omitting the modifiers for ease of reference. Such shorthand may offend certain attorneys and copyeditors, but does not offend the APA. We therefore proceed to a *Chevron* analysis.

Appendix C

III.

Under the first step of *Chevron*, our task is to consider whether "the intent of Congress is clear" with respect to the interpretation of the state and local funding provision. *Chevron*, 467 U.S. at 842. As we noted above, the statute provides for enhanced reimbursement if a hospital

> is located in an urban area, has 100 or more beds, and can demonstrate that its net inpatient care revenues (excluding any of such revenues attributable to [Medicare or Medicaid]), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceed 30 percent of its total of such net inpatient care revenues during the period.

42 U.S.C. § 1395ww(d)(5)(F)(i)(II). The Secretary argues that the statute is inherently ambiguous, in that "total of such net inpatient care revenues" might refer back to simply the entire category of "net inpatient care revenues" or might instead include the modifying parenthetical "(excluding any of such revenues attributable to [Medicare or Medicaid])." In contrast, North Broward argues that the statute is unambiguous, and that the Secretary's interpretation conflicts with the text of the statute. According to North Broward, by interpreting "total of such net inpatient care revenues" as identical with "net inpatient care revenues," the Secretary's interpretation fails to give effect to the words "of such."

North Broward's argument implicitly assumes that "such" is surplusage if it is not serving some limiting or

particularizing role. The district court adopted a similar view. Relying on a portion of the definition of "such" from Black's Law Dictionary, which notes that "such" "represents the object as already particularized in terms which are not mentioned, and is a descriptive and relative word, referring to the last antecedent," *Black's Law Dictionary* 1432 (6th ed. 1990), the court concluded that "net inpatient care revenues (excluding any of such revenues attributable to [Medicare] or [Medicaid])" was the last antecedent, since the parenthetical phrase "particularizes" the object. *North Broward*, 997 F. Supp. at 45. In our view, this analysis takes too narrow a view of the uses of the word "such." While it often serves the particularizing role envisioned by North Broward and the district court, the word "such" can also be used simply to refer back to something previously mentioned but not "particularized." As the Secretary notes, this use of "such" does not render the word surplusage — it still serves a role in "helping the reader to identify concepts that have already been employed in a long or complicated piece of writing." Secretary's Reply Brief at 18.

Where both a "particularizing" and a "non-particularizing" interpretation of "such" are possible, it need not be the case that the particularizing interpretation prevails. For example, in *Hogar Agua y Vida en el Desierto, Inc. v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994), the court encountered a provision whose prefatory clause made the provision applicable to any "single-family house sold or rented by an owner," and whose following provisos referred to "such single-family houses." Although it was argued that the phrase in the provisos unambiguously related back to the complete phrase — "single-family house sold or rented

by an owner," rather than to single-family houses generally, the court found the language ambiguous. *Id.* at 185-86. Accordingly, the court construed the statute in accordance with its remedial goals, and held that the references to "such single-family houses" did not incorporate the phrase "sold or rented by an owner," but rather simply referred to any single-family houses. *Id.* at 186.

United States v. Bowen, 100 U.S. 508 (1879), upon which North Broward relies, is not to the contrary. In that case, the Supreme Court read the statutory phrase "all such pensioners" not to refer to all pensioners, but to a subset of pensioners previously described, noting that the alternate interpretation would render "such" useless. *Id.* at 512. However, *Bowen* differs from the present situation in important respects. First, the provision considered in *Bowen* had not previously referred to the class of pensioners generally, but had *only* referred to a certain subset. Thus, the Court noted that "[t]here is no antecedent use of the word 'pensioners' in the [relevant] chapter . . . to which the word *such* can refer, but the immediately preceding sentence in the same section." *Id.* Accordingly, "such" either had to refer back to the subset, or to nothing. That is not the case here. Second, the *Bowen* Court's task was not the same as ours. The *Bowen* Court had simply to choose between two interpretations of the statute. We must decide whether there is a clear congressional intent which precludes the Secretary's view. *Bowen* did not involve the rejection of the interpretation of those charged with administering the statute. Not only did *Bowen* long predate *Chevron*, but, as the pensioners there pointed out, the interpretation of the provision ultimately chosen by the Court had apparently been

"uniformly given to it by the Commissioner of Pensions," who was charged with the duty of executing the statute. *Id.* at 511.

Given a choice between attributing to "such" the simple referential function described by the Secretary or a particularizing function, we might ordinarily be inclined to choose the latter, which arguably gives "such" a more meaningful role. However, the provision at issue does not unambiguously require such an interpretation, and indeed, other features of the provision make the Secretary's interpretation of "such" seem more than reasonable. First, the denominator refers not simply to "such net inpatient care revenues" but to the "total of such net inpatient care revenues." North Broward correctly observes that if "such net inpatient care revenues" incorporated the exclusion of Medicare and Medicaid revenues, then "total of such net inpatient care revenues" would as well. Nonetheless, we find the presence of the phrase "total of" at least suggestive that the phrase following is to be all-encompassing, without exclusions. Indeed, this seems the only way to give any real function to the phrase "total of."

In addition, the syntactical structure of the phrase describing the numerator makes it unusually difficult to isolate the antecedent of "such net inpatient care revenues" in the denominator. Even if we were intent on interpreting this phrase as referring to "net inpatient care revenues" as previously particularized, it would not be a simple task. This is so because the reference to "net inpatient care revenues" in the numerator is particularized not only by the parenthetical excluding Medicare and Medicaid revenues,

but by two additional phrases as well. The numerator consists of "net inpatient care revenues (excluding any of such revenues attributable to [Medicare or Medicaid]), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources." 42 U.S.C. § 1395ww(d)(5)(F)(i)(II). North Broward makes sensible arguments explaining why the last two phrases cannot reasonably be read as being within the particularization incorporated by the "such" in the denominator, and we do not suggest that they are. But this reasoning necessarily departs from a simple rule that "such" always incorporates previous particularizations, and illustrates that the unwieldy formulation of the numerator makes blanket application of such a rule unworkable here. Given this, it is impossible to conclude that Congress clearly intended that "such" serve the specific particularizing role advanced by North Broward.

The Secretary argues that her interpretation is also bolstered by consideration of the provision's original wording and the change made by the 1987 amendment. The sole modification to the provision made by the 1987 Act was to replace the requirement that the numerator "exceed 30 percent of [the hospital's] total of such revenues" with a requirement that the numerator "exceed 30 percent of [the hospital's] total of such net inpatient care revenues." *See* OBRA § 4009(j)(3)(A), 101 Stat. 1330, 1330-59. According to the Secretary, the 1987 change was merely intended to clarify that the phrase "total of such revenues" was not meant to indicate gross revenues rather than net. In the Secretary's view, this is supported by a string of words from the

Appendix C

Conference Report accompanying the 1987 amendment (calling it a sentence would be too kind):

> [T]here has been controversy over the interpretation of current statutory language which refers to inpatient care revenues as "net inpatient care revenues" in one location, but refers to "such revenues" has been interpreted to mean either gross inpatient revenues (revenues the hospital would receive if all patients paid the hospital's full charges) or net inpatient revenues (gross revenues minus bad debts, contractual allowances, and charity care).

H.R. Conf. Rep. No. 100-495, at 543 (1987). While impossible to parse grammatically, this is the only passage in the legislative history to which we have been referred which meaningfully attempts to explain the motivation for the 1987 amendment. It provides at least minimal support for the Secretary's view of the purpose of that amendment.

Whether or not the 1987 amendment was made only to clarify the net versus gross issue, it was styled a "technical correction," *see* OBRA § 4009(j)(3)(A), 101 Stat. 1330, 1330-59, suggesting that only clarification and not substantive change was intended. Thus our concern is the meaning of the phrase "such revenues" as used in describing the denominator of the ratio in the original 1986 enactment, and as "clarified" in 1987 to read "such net inpatient care revenues."

As originally enacted, the provision provided an adjustment for any hospital that could

> demonstrate that its *net inpatient care revenues* (excluding any of *such revenues* attributable to [Medicare or Medicaid]), during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceed 30 percent of its total of *such revenues* during the period.

COBRA § 9105(a)(F)(i)(II), 100 Stat. 82, 158 (emphasis added). The first occurrence of "such revenues" in this passage unambiguously referred back to "net inpatient care revenues." In the Secretary's view, the second occurrence of "such revenues" had the same meaning as the first, referring back simply to "net inpatient care revenues," and since the 1987 amendment did not implement any substantive change, the current "such net inpatient care revenues" language in the denominator has the same meaning. While we cannot assume that the antecedent of the second occurrence of "such revenues" would necessarily have to be the same as that of the first, we agree that the previous occurrence of "such revenues" with a clear antecedent does seem to provide at least some support for construing the latter occurrence of "such revenues" (and thus the amended "such net inpatient care revenues") as referring to the same antecedent.

The Secretary also asserts that her interpretation of the statute is the only one compatible with the legislative history of the original act, which indicated that the adjustment applied to a hospital if "at least 30% of its net inpatient care revenue is provided by local or state governments for inpatient care for low-income patients not otherwise

reimbursed by medicaid." H.R. Rep. No. 99-241, pt. 1, at 16. The House Report also states that "[t]he Committee further intends that *the denominator of this equation, net inpatient care revenue*, be defined according to the generally accepted accounting principles in the hospital industry; i.e., this factor should represent gross patient care revenues less deductions from revenue (other than contractual allowances), as those terms are generally used." *Id.* at 18-19 (emphasis added). We agree that these passages are consistent with the Secretary's view that the relevant state and local funding was required to be 30% or more of *total* net inpatient care revenues. The Conference Report further supports the Secretary's view, describing hospitals qualifying under this provision as "those which can demonstrate that more than 30 percent of their revenues are derived from State and local government payments for indigent care provided to patients not covered by medicare or medicaid." H.R. Conf. Rep. No. 99-453, at 461-62 (1985).

However, North Broward argues that since the present wording of the provision dates only from the 1987 amendment, the legislative history of that amendment, and not that of the original enactment, is the better source for determining Congress's intent. North Broward notes that in discussing "present law," the 1987 Conference Report noted that a hospital qualified under the provision at issue if "it can demonstrate that more than 30 percent of its inpatient care revenues (excluding any Medicare or Medicaid revenues) are provided by State and local government payments for indigent care." H.R. Conf. Rep. No. 100-495, at 543. The Conference Report further noted that the amendment "[c]larifies that a hospital would qualify if more

than 30 percent of its net inpatient care revenues (excluding any Medicare or medicaid revenues) are provided by State and local government payments for indigent care." *Id.* at 545. The Secretary argues, and we agree, that the 1987 Conference Report's characterization of existing law is entitled to little weight. As the Supreme Court has observed, subsequent legislative history is "an unreliable guide to legislative intent." *Chapman v. United States*, 500 U.S. 453, 464 n.4 (1991). *See also Wright v. West*, 505 U.S. 277, 295 n.9 (1992); *Pierce v. Underwood*, 487 U.S. 552, 566-67 (1988). However, North Broward argues that because the 1987 legislative history accompanied an amendment to the provision at issue, its view of existing law deserves credit. While a discussion of existing law in subsequent legislative history may be more valuable where it accompanies a related amendment to the provision, *see Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988); *United States v. General Motors Corp.*, 518 F.2d 420, 436-37 (D.C. Cir. 1975), here there is no evidence that the exclusion of Medicare and Medicaid funds from the denominator of the ratio was the focus of attention of Congress, the Conference Committee, or even the author of the report. Hence the passages in the Conference Report on which North Broward relies as evidencing whether Medicare and Medicaid were intended to be excluded from the denominator are mere "legislative dicta," *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 478 (1997), and we do not view these remarks as speaking meaningfully to this issue.

Furthermore, even if we were inclined to give weight to the 1987 Conference Report, which we are not, it is not at all clear that the report, taken as a whole, supports North

Broward's position. To be sure, in the passage cited by North Broward, the Conference Report characterizes existing law as providing an adjustment if a hospital can demonstrate "that more than 30 percent of its inpatient care revenues (excluding any Medicare or Medicaid revenues) are provided by State and local government payments for indigent care." Because of the placement of the parenthetical after "revenues" rather than at the end of the sentence, this portion of the history is consistent with North Broward's interpretation. However, elsewhere in the same Conference Report, there is language encouraging the Secretary "expeditiously to implement the disproportionate share adjustment for hospitals which receive more than thirty percent of net patient revenues from State and local governmental sources," H.R. Conf. Rep. No. 100-495, at 525 (1987), and setting the amount of the adjustment at 15% for hospitals "which receive at least 30 percent of their net inpatient care revenues from State and local payments for indigent care," *id.* at 521. Because these portions of the report refer to the required ratio as 30% of net revenues with no reference to excluding Medicare and Medicaid, they do not support North Broward's interpretation. Thus, in our view, the only lesson to be drawn from the 1987 legislative history is that the individuals who wrote it had not carefully considered, or at least didn't quite agree on, what the original provision meant.

In sum, the provision's textual unwieldiness is not illuminated by this jumbled legislative history, and we cannot discern any clear congressional intent regarding the meaning of the provision. Accordingly, we agree with the Secretary that the provision is ambiguous, and proceed to the second step of the *Chevron* analysis.

Appendix C

IV.

We have little difficulty concluding that the Secretary's interpretation is a permissible construction of the provision. Indeed, the ambiguity of the provision described above arises largely because the provision is reasonably amenable to both the Secretary's and North Broward's readings. Nonetheless, North Broward argues that even if the Secretary's interpretation is a possible parsing of the provision's text, it is unreasonable in that it effectively penalizes hospitals for treating Medicare and Medicaid patients. This is so, the argument goes, because under the Secretary's interpretation, the more services a hospital furnishes to Medicare and Medicaid patients, the lower its ratio will be, since revenues for those services will be included in the denominator, but not the numerator. In contrast, North Broward suggests that under its interpretation, services to Medicare and Medicaid patients "do not help a hospital qualify for a disproportionate share adjustment . . . but neither do they hurt the hospital." North Broward Brief at 39.

We find North Broward's argument unconvincing. First, even if increased Medicare and Medicaid funding adversely affected a hospital's ratio under *this* provision, hospitals treating an unusually large number of Medicaid and low-income Medicare patients are entitled to the disproportionate share adjustment under the alternate mechanism of 42 U.S.C. § 1395ww(d)(5)(F)(i)(I), (v), (vi). The provision at issue in this case seeks to identify and appropriately compensate hospitals receiving significant state and local funding for indigent care *apart from* Medicaid and Medicare spending. To the extent that an increase in Medicaid and Medicare

revenues decreases the proportion of revenues attributable to other state and local funding, a decrease in the hospital's ratio could well be what Congress had in mind.

More importantly, we are unconvinced of North Broward's factual premise — at least in some circumstances, it is the Secretary's interpretation, and not North Broward's, that is neutral with regard to services to Medicare and Medicaid patients. For example, suppose that in a given year, Hospital A and Hospital B each had total net inpatient care revenues of $100,000,000, of which $20,000,000 was state and local funding not attributable to Medicare or Medicaid. Suppose, however, that Hospital A received $40,000,000 net inpatient care revenues from Medicare and Medicaid, and $40,000,000 from other sources such as private insurance and individual payments, while Hospital B received $50,000,000 from Medicare and Medicaid and $30,000,000 from other sources. Thus, the only difference in the two hospitals' revenues is the amount of funding from Medicare and Medicaid versus private sources. The ratios calculated under this provision would be as follows:

Appendix C

Secretary's interpretation

Hospital A:	Numerator	=	$20,000,000 state and local funding
	Denominator	=	$100,000,000 total
	Ratio	=	20/100
Hospital B:	Numerator	=	$20,000,000 state and local funding
	Denominator	=	$100,000,000 total
	Ratio	=	20/100

North Broward's interpretation

Hospital A:	Numerator	=	$20,000,000 state and local funding
	Denominator	=	$100,000,000 total
			– $40,000,000 Medicare & Medicaid
		=	$60,000,000
	Ratio	=	20/60
Hospital B:	Numerator	=	$20,000,000 state and local funding
	Denominator	=	$100,000,000 total
			– $50,000,000 Medicare & Medicaid
		=	$50,000,000
	Ratio	=	20/50

Under the Secretary's method, the fact that Hospital B had more services funded by Medicare and Medicaid than

Hospital A leads to no difference in the ratios for the two hospitals. Under North Broward's method, however, Hospital B's greater Medicare and Medicaid funding leads to a higher ratio. We do not understand why North Broward views this as "neutral."

Furthermore, in some situations, this feature of North Broward's interpretation would lead to results which seem less consistent with the apparent purpose of the provision than would be the case under the Secretary's interpretation. For example, consider two otherwise qualifying hospitals, C and D, each of which has total net inpatient care revenues of $100,000,000, of which $10,000,000 is from Medicaid. Suppose that Hospital C receives heavy state and local funding not attributable to Medicaid or Medicare, in the amount of $23,000,000, while Hospital D receives $10,000,000 in such funds. One would expect that if either hospital would qualify for a disproportionate share adjustment under the provision targeted at hospitals with unusually high state and local funding, it would be Hospital C. However, under North Broward's interpretation, as we understand it, this would not necessarily be the case. In particular, suppose that Hospital D is in an area with a large number of retirees, and therefore has a large amount of Medicare revenues totaling $60,000,000, while Hospital C has Medicare revenues of only $10,000,000. The calculations under North Broward's method would proceed as follows:

Appendix C

Hospital C: Numerator = $23,000,000
Denominator = $100,000,000 – $10,000,000 Medicaid – $10,000,000 Medicare
= $80,000,000

The ratio is thus 23/80, which is less than 30%.

Hospital D: Numerator = $10,000,000
Denominator = $100,000,000 – $10,000,000 Medicaid – $60,000,000 Medicare
= $30,000,000

The ratio is thus
10/30 = 1/3, which is greater than 30%.

Thus despite its far greater state and local funding, Hospital C would not qualify for the adjustment under North Broward's interpretation, while Hospital D would. We note that the difference in Medicare funding that tips the balance in favor of Hospital D need not be for indigent elderly at all, but could equally as well be for wealthy seniors with Winnebagos and supplemental insurance. It is hard to see why serving a high number of such patients should affect Hospital D's ratio so favorably. We see little logic in this feature of North Broward's interpretation, and cannot condemn the Secretary's failure to adopt it.

For the foregoing reasons, the decision of the district court is

Reversed.

APPENDIX D — RELEVANT STATUTE

42 U.S.C. § 1395ww(d)(5)(F)(i)(I)-(II)

§ 1395ww. Payments to hospitals for inpatient hospital services

* * *

(F)(i) For discharges occurring on or after May 1, 1986, and before October 1, 1997, the Secretary shall provide, in accordance with this subparagraph, for an additional payment amount for each subsection (d) hospital which —

> **(I)** serves a significantly disproportionate number of low-income patients (as defined in clause (v)), or
>
> **(II)** is located in an urban area, has 100 or more beds, and can demonstrate that its net inpatient care revenues (excluding any of such revenues attributable to this subchapter [Medicare] or State plans approved under subchapter XIX of this chapter [Medicaid], during the cost reporting period in which the discharges occur, for indigent care from State and local government sources exceed 30 percent of its total of such net inpatient care revenues during the period.

* * * *